

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS K. BECELLA,)	8:04CV380
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	AND ORDER
KELLOGG USA, INC.,)	
)	
Defendants.)	

This matter is before the court on Defendant's motion for summary judgment (filing 37). Upon consideration of the pleadings, evidence,¹ and briefs of the parties, I conclude that the motion should be denied.

Plaintiff, who was 60 years old when his employment as a supervisor at Defendant's Omaha plant was terminated, claims that he was discriminated against on the basis of age because he was replaced by a substantially younger and less qualified individual.² Defendant claims that Plaintiff was terminated because his job performance was unsatisfactory.

¹ Plaintiff has objected to and moved to strike two of Defendant's exhibits. Plaintiff's motion to strike (filing 42) will be granted in part and denied in part. Exhibit 5 is not properly authenticated, and Plaintiff testified at his deposition that he did not recall seeing this memo previously. It has not been shown to be admissible in evidence. See Fed. R. Civ. P. 56(e); NECivR 7.1(a)(2)(C). Thus, it will be stricken. Exhibit 15, the Nebraska Equal Opportunity Commission's "no reasonable cause" determination, has been considered. See Bassett v. City of Minneapolis, 211 F.3d 1097, 1102 n. 12 (8th Cir. 2000); Fed. R. Evid. 803(8)(C). I reserve ruling as to whether this exhibit may be used at trial, however. See Fed. R. Evid. 403.

² Plaintiff brings his action pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623, and the Nebraska Act Prohibiting Unjust Discrimination Because of Age, Neb. Rev. Stat. § 48-1004.

On the evidence presented, I find that genuine issues of material fact preclude the entry of summary judgment.³

Accordingly,

IT IS ORDERED that:

1. Plaintiff's motion to strike (filing 42) is granted in part and denied in part, as follows:
 - a. Defendant's Exhibit 5 (filing 39) is stricken.
 - b. Defendant's Exhibit 15 (filing 39) is not stricken.
2. Defendants' motion for summary judgment (filing 37) is denied.

September 27, 2005.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge

³ I note that the case is set for trial during the week of October 24, 2005. In an effort to resolve this dispositive matter expeditiously, I have elected not to discuss my findings in detail. Suffice it to say that summary judgment should seldom be granted in employment discrimination cases. See Peterson v. Scott County, 406 F.3d 515, 520 (8th Cir. 2005).